



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 26, 1994

Mr. Alexis A. Walter, III  
Interim City Attorney  
City of Bryan  
P.O. Box 1000  
Bryan, Texas 77805

OR94-483

Dear Mr. Walter:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID #25668.

The City of Bryan (the "city") received a request for information relating to possible development of a motel or other facility on the Bryan Golf Course site. You state that the city has provided the requestor with most of the information requested. However, you contend that seven responsive documents are excepted from disclosure under section 552.111 of the Open Records Act. These documents have been labeled Documents 1 through 7.

Section 552.111 excepts from disclosure interagency or intra-agency communications "consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5. We note that this office previously held that section 552.111 was applicable to the advice, opinion and recommendations used in decision-making processes within an agency or between agencies. Open Records Decisions No. 574 (1990) at 1-2; 565 (1990) at 9. However, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court addressed the proper scope and interpretation of this section. In light of that decision, this office reexamined its past rulings. In Open Records Decision No. 615, we determined that in order to be excepted from disclosure, the advice, opinion and recommendations must be related to policymaking functions of the governmental body rather than to decision-making concerning routine personnel and administrative matters.

The first step in deciding the applicability of section 552.111 is to determine the relationship of the entities whose communications are at issue. You advised this office that the Bryan Development Foundation ("BDF") is a "development corporation funded

by the City of Bryan to assist the city in attracting new commercial prospects." Because BDF spends and is supported by public funds, it appears to be a governmental entity as defined in the Open Records Act. Gov't Code § 552.003 ("governmental body" defined). Your letter also indicates that BDF retained Forester-Henry and Associates ("F-H"), PKF Consulting ("PKF"), and a named individual as consultants for the city. Section 552.111 protects not only communications within a governmental agency or between governmental agencies, but also communications from a consultant outside of the governmental entity if the consultant has some duty to advise the entity or to act in its behalf in an official capacity. Open Records Decision No. 563 (1990) at 5. We will consider each document.

Document 1 is a memorandum from the city manager's assistant to the director of public works. We note that the memorandum is on BDF letterhead. Assuming that the memorandum is a communication from BDF to the city, this is an interagency communication.<sup>1</sup> Document 2 is from F-H to the city manager. From information provided this office, it appears that F-H was under contract to provide the city a financial feasibility study concerning the development. However, Document 2 was written prior to the time that F-H was engaged as a consultant. Since it was made prior to the time F-H was engaged as a consultant with the duty to advise the city or to act on behalf of the city, Document 2 is not an interagency communication.

Document 3, the letter from BDF to a legislator, is not an interagency or intra-agency communication under section 552.111. Document 4, a letter from BDF to the city, is an interagency correspondence between two governmental entities. Document 5 is a letter from the individual consultant to the city. Since you indicate that the individual was retained to deal with PKF on behalf of the city, Document 5 is an interagency communication. Document 6 is a letter from PKF to the city, and Document 7 is a hotel feasibility study prepared by PKF for the city. These documents are interagency communications because PKF was retained to prepare the study for the city, and thus appears to have had a duty to advise the city or to act on behalf of the city.

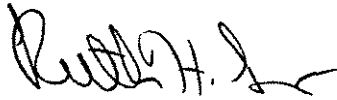
As we have indicated, Documents 1, 4, 5, 6 and 7 are interagency or intra-agency communications. However, section 552.111 will except from disclosure only those portions of interagency or intra-agency documents that reflect advice, opinion and recommendation related to the city's policymaking functions. Open Records Decision No. 615 at 5. Factual information and written observations of facts are not excepted from disclosure. Open Records Decision Nos. 574 at 2; 419 (1984) at 3. We have marked the information in these documents that may be withheld from disclosure under section 552.111. The remaining unmarked information, along with Documents 2 and 3, must be disclosed. We note that the city has the discretion to disclose the information that we have indicated may be withheld under section 552.111. Gov't Code § 552.007; Open Records Decision No. 470 (1987) at 2-3.

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<sup>1</sup>If the communication is from one city official to another city official and only incidentally on BDF letterhead, this would still be an interagency or intra-agency communication.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Ruth H. Soucy", with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/LRD/rho

Ref.: ID# 25668

Enclosures: Marked documents

cc: Mr. Mark O'Connor  
4307 Oaklawn  
Bryan, Texas 77801  
(w/o enclosures)